

Marquis & Aurbach
ALBERT G. MARQUIS, ESQ.
Nevada Bar No. 1919
E-mail: amarquis@marquisaurbach.com
JASON M. GERBER, ESQ.
Nevada Bar No. 9812
10001 Park Run Drive
Las Vegas, Nevada 89145
Phone: (702) 821-2427
Fax: (702) 382-5816
E-mail: jgerber@marquisaurbach.com
Attorneys for Defendants Maryland Square
Shopping Center, LLC, the Herman Kishner Trust
dba Maryland Square Shopping Center,
Irwin Kishner, Jerry Engel,
Bank of America, as Trustees for
The Herman Kishner Trust, and
Maryland Square, LLC

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

PETER J. VOGGENTHALER; VICTOR
BECERRA; ARTHUR BODENDORFER;
BRENDA C. CHAFFIN; MICHAEL J. SOLMI;
JASON COWLES; JANE GAUTHIER;
HONORE' GAUTHIER; NIKOLAS
KONSTANTINOU; DRAGAN KURAJICA;
KENNETH LOWTHER; JAMES
LUEHMANN; JACQUELINE LUEHMANN;
RUTH MANNHEIMER; WILLIAM
MONTERO; BARBARA MONTERO;
CLIFFORD ROGERS; SHARON ROGERS;
HERMANN ROSNER; MARKUS
ROTHKRANZ; DANIEL SOLDINI; CHARLES
WALKER; VERNA WALKER; JACK
YENCHECK; OFELIA YENCHEK, all
individual and as Plaintiff Class Representatives,

Plaintiffs,

vs.

AL PHILLIPS THE CLEANER, INC., a Nevada
corporation; DCI USA, INC., a Nevada
corporation; MARYLAND SQUARE, LLC, a
Nevada Limited Liability Company;
MARYLAND SQUARE SHOPPING CENTER
LIMITED LIABILITY COMPANY, a Nevada
Limited Liability Company; DOES I through X;
and ROE corporations XI through XX,

Defendants.

Case No: 2:08-CV-01618-RCJ (GWF)

**DEFENDANTS, MARYLAND SQUARE
SHOPPING CENTER, LLC, THE
HERMAN KISHNER TRUST, DBA
MARYLAND SQUARE SHOPPING
CENTER, IRWIN KISHNER, JERRY
ENGEL, BANK OF AMERICA, AS
TRUSTEES FOR THE HERMAN
KISHNER TRUST, MARYLAND
SQUARE, LLC AND CLARK COUNTY
SCHOOL DISTRICT'S STATEMENT
OF DISPUTED AND UNDISPUTED
FACTS IN SUPPORT OF
OPPOSITION TO MOTION FOR
SUMMARY JUDGMENT**

Defendants, Maryland Square Shopping Center, LLC, the Herman Kishner Trust, dba Maryland Square Shopping Center, Irwin Kishner, Jerry Engel, Bank of America, as Trustees for The Herman Kishner Trust, Maryland Square, LLC and Clark County School District (hereinafter collectively “Maryland Square”), respectfully submit this Statement of Disputed and Undisputed Facts in Support of Opposition to Motion for Summary Judgment.

PLAINTIFFS’ CONTENTIONS REGARDING MATERIAL FACTS	MARYLAND SQUARE DEFENDANTS’ RESPONSE
1. Maryland Square Shopping Center is located at 3651 through 3681 South Maryland Parkway in Las Vegas, Nevada. Kishner FAC 2:20-22	Admit
2. Defendant Herman Kishner, doing business as Maryland Square Shopping Center, was the owner of the shopping center in 1968. Kishner FAC 2:14-22; 3:22-25.	Admit
3. The Herman Kishner Trust, created in 1969 by defendant Herman Kishner, is the successor-in-interest to defendant Herman Kishner with respect to the Shopping Center. Kishner FAC 2:14-22; 5:4-8	Admit
4. Defendant Maryland Square Shopping Center Limited Liability Company is a limited liability company organized under the laws of Nevada and the successor-in-interest to the Herman Kishner Trust with respect to the Shopping Center. Kishner FAC 2:18-22; 5:5-8	Admit
5. In 2002, Clark County School District purchased the Shopping Center from defendant Maryland Square Shopping Center Limited Liability Company. Kishner FAC 6:8-12	Admit

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Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

6. In 2005, defendant Maryland Square, LLC purchased the Shopping Center from Clark County School District and is the current owner of the Shopping Center. Maryland Square, LLC's Answer 3:3-4	Admit
7. Shapiro Bros. Investment Co. ("SBIC") is a dissolved Nevada corporation. Answer and Cross-Claim of SBIC 18:5-6	Admit
8. From approximately 1968 through 1984, SBIC operated a dry cleaning facility at the Shopping Center, at 3661 South Maryland Parkway ("the Site"). Third Party Claim of Shapiro Bros. Investment Corp. 5:7-9	Admit
9. SBIC leased the Site from the owner. Kishner FAC 3:3-9, 3:22-4:2, 4:11-14	Admit
10. SBIC used PCE in its dry cleaning operations. SBIC's Responses to Plaintiffs' Interrogatories, Response Nos. 1, 3, 4, and 5	Admit.
11. SBIC also released PCE into the ground at the Site. SBIC's Responses to Plaintiff Peter J. Voggenthaler's Interrogatories, Response Nos. 5	Deny. The nature and extent to which SBIC released PCE into the ground and whether such release is at all connected to the PCE in the plume is denied. Any resolution of the material disputed facts requires the completion of Tetra Tech's on-going investigation. (See Exs. G and I)
12. In 1984, Johnson Group, Inc., the predecessor of DCI USA, Inc. (collectively "DCI"), purchased the "Al Philips the Cleaner, Inc." business from SBIC. Kishner FAC 4:13-19; Cross-Complaint of DCI 12:15-18 and 13:25-27.	Admit
13. DCI leased the Site until 2003. Kishner FAC 4:13-19; Cross-Complaint of DCI 13:18 – 14:6	Admit

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14. DCI operated the dry cleaning facility at the Site until approximately 2000. DCI Cross-Complaint 12:15-23 and 13:28 – 14:6	Admit
15. DCI used PCE in its dry cleaning operations. Kishner FAC 5:18-20	Deny. A determination of the nature and extent to which SBIC released PCE into the ground and whether such release is at all connected to the PCE in the plume, which is denied, is pending the outcome of Tetra Tech's on-going investigation. (<u>See</u> Exs. G and I)
16. DCI also released PCE into the ground at the Site. Kishner FAC 5:20-26	Deny. A determination of the nature and extent to which DCI released PCE into the ground and whether such release is at all connected to the PCE in the plume, which is denied, is pending the outcome of Tetra Tech's on-going investigation. Further investigation regarding the impact of the 300 gallon PCE release at the Dr. Clean facility is also necessary. (<u>See</u> Exs. G, H and I)
17. In approximately November 2000, the Nevada Division of Environmental Protection ("NDEP") was notified of PCE contamination of the Site. Kishner FAC 5:10-12; NDEP Complaint 5:16-17	Maryland Square Defendants cannot admit or deny the allegation because the reference to the "site" is undefined. The nature and extent and origin of PCE into the ground and whether such PCE is in anyway connected to Maryland Square is denied, and the subject of an on-going investigation. (<u>See</u> Exs. G and I)
18. NDEP deems PCE to be a hazardous substance. NDEP Complaint 5:2-5	Deny as a matter of law. The NDEP set acceptable limits for PCE exposure. (<u>See</u> Exs. B, E, F and G)
19. Through oversight of NDEP, the Maryland Square defendants have conducted an investigation of the Site. Kishner FAC 5:10-12; NDEP Complaint 5:18-21.	Deny. The investigation in this matter is not complete. Review and assessment of disputed facts concerning liability and causation is on-going, the purpose for which is to determine whether Dr. Clean, Boulevard Mall or other third parties caused, in whole, or in part, the subject PCE plume. Further investigation regarding the impact of the 300 gallon PCE release at the Dr. Clean facility is also necessary. (<u>See</u> Exs. G, H and I)
20. This investigation has revealed the presence of PCE in the soil and groundwater in and around the Site. Krasnoff Decl. ¶ 8; Kishner FAC 5:14-17; NDEP Complaint 5:18-21	Deny. The investigation in this matter is not complete. Review and assessment of disputed facts concerning liability and causation is on-going, the purpose for which is to determine whether Dr. Clean, Boulevard Mall or other third parties caused, in whole, or in part, the subject PCE plume. Further, additional review of the large quantity of petroleum products removed from MW 11 remains necessary. (<u>See</u> Exs. G and I)

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21. This investigation has also revealed a plume of groundwater containing PCE emanating from the Site ("the Plume"). Krasnoff Decl. ¶9; Kishner FAC 5:16-17; NDEP Complaint 5:18-21	Deny. The investigation in this matter is not complete. Review and assessment of disputed facts concerning liability and causation is on-going, the purpose for which is to determine whether Dr. Clean, Boulevard Mall or other third parties caused, in whole, or in part, the subject PCE plume. Further, additional review of the large quantity of petroleum products removed from MW 11 remains necessary. (<u>See Exs. G and I</u>)
22. The Plume has extended eastward into a residential neighborhood ("the Neighborhood"). Krasnoff Decl. ¶¶9, 12; NDEP Complaint at 5:22-25; NDEP correspondence, dated June 19, 2007, at p. 1; NDEP correspondence, dated Aug 28, 2008, at p. 2.	Deny. The investigation in this matter is not complete. Review and assessment of disputed facts concerning liability and causation is on-going, the purpose for which is to determine whether Dr. Clean, Boulevard Mall or other third parties caused, in whole, or in part, the subject PCE plume. Further, additional review of the large quantity of petroleum products removed from MW 11 remains necessary. (<u>See Exs. G and I</u>)
23. The Plume has volatilized into soil gas beneath the Neighborhood, thereby presenting a threat to the indoor air of the residents of the Neighborhood. Krasnoff Decl. ¶ 11; NDEP Complaint 5:26-6:3; NDEP correspondence, dated Aug 28, 2008, at p. 2.	Deny. The investigation in this matter is not complete. Review and assessment of disputed facts concerning liability and causation is on-going, the purpose for which is to determine whether Dr. Clean, Boulevard Mall or other third parties caused, in whole, or in part, the subject PCE plume. (<u>See Exs. G and I</u>) The Maryland Square Defendants dispute the testing methodology used by the NDEP to determine the presence of soil gas. (<u>See Ex. G.</u>)
24. The PCE concentration in the Plume beneath the Neighborhood is above the maximum contaminant level for PCE. Krasnoff Decl. ¶ 10; NDEP Complaint 5:22-25 and 6:24-26.	Deny. The maximum level appears to be under Boulevard Mall. (<u>See Exs. F and G</u>) Review and assessment of disputed facts concerning liability and causation is on-going, the purpose for which is to determine whether Dr. Clean, Boulevard Mall or other third parties caused, in whole, or in part, the subject PCE plume. Further investigation regarding the impact of the 300 gallon PCE release at the Dr. Clean facility is also necessary. (<u>See Exs. G, H and I</u>)
25. Plaintiffs' residential properties are located within the Neighborhood that is threatened by the Plume. Krasnoff Decl. ¶ 13; Plaintiffs' Complaint 3:24-6:6.	Deny. The investigation in this matter is not complete. Review and assessment of disputed facts concerning liability and causation is on-going, the purpose for which is to determine whether Dr. Clean, Boulevard Mall or other third parties caused, in whole, or in part, the subject PCE plume.

	The Maryland Square Defendants dispute the testing methodology used by the NDEP to determine the presence of soil gas. <u>See</u> Ex. G.
26. On May 4, 2009, NDEP filed a complaint against the Maryland Square defendants for cost recovery under 42 U.S.C. § 9607 due to PCE contamination at the Site. NDEP Complaint.	Admit.
27. On April 30, 2009, the Office of the Attorney General for the State of Nevada sent notice of its intent to commence a civil action under 42 U.S.C. § 6972 against Maryland Square Shopping Center Limited Liability Company and Maryland Square, LLC for PCE contamination related to the Site. RCRA Notice	Admit.
28. Plaintiffs filed a Complaint on November 11, 2008. Complaint	Admit.
29. The complaint stated a sole cause of action for injunctive relief under RCRA, 42 U.S.C. § 6972(a)(1)(B). Complaint	Admit.
30. Plaintiffs served notice of this RCRA action more than 90-days prior to the filing of the complaint. RCRA Notice, dated March 19, 2008; RCRA Notice, dated April 2, 2008.	Admit.

DISPUTED MATERIAL FACTS

DISPUTED FACT	SUPPORTING EVIDENCE
1. The Maryland Square Defendants caused or contributed to the PCE in the subject plume.	<u>See</u> Ex. G.
2. A PCE spill in 1993 at the Dr. Clean facility at Maryland Parkway contributed to the alleged PCE contamination.	<u>See</u> Exs. G, H and I.
4. Operations of a dry cleaner, automotive repair facilities or other entities on the Boulevard Mall property contributed to the alleged PCE contamination as evidenced by the quantity of petroleum found in MW 11.	<u>See</u> Exs. G and I.

5. There is an imminent threat to health arising from the alleged PCE contamination.	<u>See Exs. G and I.</u>
6. There is an imminent threat to the environment arising from the alleged PCE contamination	<u>See Ex. G.</u>

DATED: This 23rd day of November, 2009.

MARQUIS & AURBACH

By: /s/ Jason M. Gerber

ALBERT G. MARQUIS, ESQ.

Nevada State Bar No. 1919

JASON M. GERBER, ESQ.

Nevada Bar No. 9812

10001 Park Run Drive

Las Vegas, Nevada 89145

Attorney(s) for Defendants Maryland Square

Shopping Center, LLC, the Herman Kushner

Trust dba Maryland Square Shopping Center,

Irwin Kushner, Jerry Engel, and Bank of

America, as Trustee for The Herman Kushner Trust and Maryland Square, LLC

MARQUIS & AURBACH

10001 Park Run Drive

Las Vegas, Nevada 89145

(702) 382-0711 FAX: (702) 382-5816

CERTIFICATE OF MAILING

I hereby certify that on the 23rd day of November, 2009, I served a copy of the foregoing
**DEFENDANTS, MARYLAND SQUARE SHOPPING CENTER, LLC, THE HERMAN
KISHNER TRUST, DBA MARYLAND SQUARE SHOPPING CENTER, IRWIN
KISHNER, JERRY ENGEL, BANK OF AMERICA, AS TRUSTEES FOR THE
HERMAN KISHNER TRUST, MARYLAND SQUARE, LLC AND CLARK COUNTY
SCHOOL DISTRICT'S STATEMENT OF DISPUTED AND UNDISPUTED FACTS IN
SUPPORT OF OPPOSITION TO MOTION FOR SUMMARY JUDGMENT** upon each of
the parties by e-mail and by depositing a copy of the same in a sealed envelope in the United
States Mail, Las Vegas, Nevada, First-Class Postage fully prepaid, and addressed to:

Alexander Robertson, IV
Jennifer L. Taylor
ROBERTSON & VICK, LLP
401 North Buffalo Drive, Suite 202
Las Vegas, NV 89145

Jan Adam Greben
GREBEN & ASSOCIATES
1332 Anacapa Street, Suite 110
Santa Barbara, CA 93101
Attorneys for Plaintiffs

Kevin A. Brown
Whitney C. Wilcher
THAGARD REISS & BROWN, LLP
5528 South Fort Apache Road
Las Vegas, NV 89148
Attorneys for Defendant Maryland Square LLC

Jeffrey R. Diver
JEFFREY R. DIVER, P.C.
437 Anthony Street
Glen Ellyn, IL 60137

Randolph L. Howard
Joseph G. Went
KOLESAR & LEATHAM, CHTD.
3320 W. Sahara Avenue, Suite 380
Las Vegas, NV 89102
Attorneys for Defendant CB Richard Ellis

Neil J. Beller, Esq.
LAW OFFICES OF NEIL J. BELLER, ESQ.
7408 W. Sahara Avenue
Las Vegas, NV 89101

Jeffrey T. Oberman, Esq.
LEVIN & OBERMAN
361 N. Canon Dr.
Beverly Hills, CA. 90210-4704

Jeremy Gilman, Esq.
BENESCH FRIEDLANDER COPLAN &
ARONOFF, LLP
200 Public Square
Suite 2300
Cleveland, OH 44114-2378
*Attorney for Defendants MELVIN SHAPIRO,
Individually, and SHAPIRO BROS.
INVESTMENT CO., a dissolved Nevada
corporation*

1 and that there is a regular communication by mail between the place of mailing and the place(s)
2 so addressed.
3

4 /s/ Roxanne Minnick
An employee of Marquis & Aurbach

MARQUIS & AURBACH
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816